France-Americaine[1]). He then referred it to the High Court in the form of a special case, which is as follows:

"(1) In the event of the court deciding that the rental under Clause 1(iv) of the said lease should relate to the land only the fair rental under Clause 1(iv) of the said lease is $5,000 per month.

(2) In the event of the court deciding that the rental under Clause 1(iv) of the said lease should relate to the land together with the buildings erected thereon the fair rental under Clause 1(iv) of the said lease is $21,000 per month."

Harun J. in what must surely be the shortest judgment on record, answered it with the words 'on the land only'.

The question which we have to decide is whether the operative part of the said lease, that is clause 1(iv) stands unaffected by the recital or whether the recital governs the terms of clause 1(iv). We do not pretend to speculate whether the parties really intended to include the said cinema building in assessing rent, except so far as we can gather their intention from the recital and the operative part of the said lease. We feel that the said lease must be construed as it stands, by what appears on the face of it, and nothing else. We are not now considering any question of rectification. If that is so, we should have to admit evidence which is not admissible on the question of construction. In the circumstances neither the Ponsford type of situation (see *Ponsford & Ors.* v. *H.M.S. Aerosols Ltd.*[2]) nor the maxim *quicquid plantatur solo, solo cedit* (see the definition of "land" as defined under section 5 of the National Land Code) applies in this case. In our view the rule to be applied to the construction of the lease has been stated with clarity by Lord Esher M.R. in *Ex parte Dawes, In re Moon.*[3] It is one entirely reasonable in itself, fundamental and long established.

"Now there are three rules applicable to the construction of such an instrument. If the recitals are clear and the operative part is ambiguous, the recitals govern the construction. If the recitals are ambiguous, and the operative part is clear, the operative part must prevail. If both the recitals and the operatice part are clear, but they are inconsistent with each other, the operative part is to be preferred."

It seems to us that the present case falls within the first rule, i.e. where the recital is clear and the operative part is ambiguous. In the present case the recital is clear and particular; it refers to the said land together with the buildings erected thereon and known as Star Theatre. But the operative part, "The said land" in clause 1(iv) is perhaps ambiguous because it does not show whether the basis of the valuation is the land only or the land and the Star Theatre. Therefore it seems to us that the recital which is clear must determine the operative part which appears ambiguous.

The appeal is allowed with costs here and below.

Appeal allowed.

Solicitors: *Skrine & Co.; Shearn & Delamore; Shook Lin & Bok.*

TOH HOCK THYE & ORS. v. TOH CHWEE BIOW

[F.C. (Wan Suleiman F.J., Salleh Abas F.J. & Hashim Yeop A. Sani J.) June 7 & November 20, 1981]

[Kota Bahru — Federal Court Civil Appeal No. 56 of 1981]

Practice and Procedure — Order to show cause why suit should not be struck out for want of prosecution — No cause shown — Inordinate and inexcusable delay — R.S.C. 1957, O. 36 r. 11(A)(2) — R.H.C. 1980, O. 34 r 8(2).

The appellants commenced a civil suit on February 22, 1975 against the respondent for fraudulent breach of trust. The respondent filed his defence on May 5, 1975. Since the filing of the defence the appellants took no step to set down the suit for trial. On August 26, 1980 the Senior Assistant Registrar, Kuala Trengganu, issued a notice to the parties to attend the Judge's Chambers for the appellants to show cause why the suit should not be struck out for want of prosecution. The parties appeared and the learned judge made an order for the suit to be struck out. The appellants appealed.

Held: (1) the plaintiff's action is liable to be dismissed for want of prosecution when the court is satisfied that (a) the plaintiff's default has been intentional and contumelious or (b) the plaintiff or his lawyer is guilty of such inordinate and inexcusable delay that the defendant has been prejudiced by it;

(2) in this case the appellants having kept the suit in abeyance for five years and three months during which they remained completely inactive and having given no answer nor satisfactory explanation at all as to this inactivity when called upon to do so by the court, were guilty of inordinate and inexcusable delay if not also of intentional and contumelious conduct which entitled the court to dismiss their action for want of prosecution.

Cases referred to:

(1) *Vasudevan* v. *Damodaran & Anor.* [1981] 2 M.L.J. 150.

(2) *Biss* v. *Lambeth* [1978] 1 W.L.R. 382.

(3) *Joyce* v. *Joyce* [1978] 1 W.L.R. 1170.

(4) *Birkett* v. *James* [1977] 3 W.L.R. 38, 45.

FEDERAL COURT.

Vinayak Pradhan for the appellants.

V.K. Palasuntharam (*S. Kulasegaran* with him) for the respondent.

Salleh Abas F.J. (delivering the judgment of the Court): On February 22, 1975 the appellants commenced a civil suit against the respondent for fraudulent breach of trust. Their statement of claim alleged that by an order of the High Court dated October 2, 1951, the respondent, who is the appellants' uncle, became the registered owner of a piece of land as a trustee for the benefit of the appellants. In June 1973 the land was transferred to the appellants. During the period between October 2, 1951 and June 1973, the trust land was managed by the respondent and it was in respect of his management or mismanagement of the land that the appellants sued the respondent for fraudulent breach of trust and asked for an account of all moneys received and expended during the period of his stewardship. The respondent filed his defence on May 5, 1975, admitting that he was a trustee during the period, but denying that he ever committed any breach of trust. Since the filing of the defence the appellants took no step to set the suit down for trial. It remained in abeyance until on August 26, 1980 when the Senior Assistant Registrar High Court, Kuala Trengganu acting under Order 34 rule 8(2) of the Rules of the High Court 1980 issued a notice to the parties and their solicitors to attend

the judge's chambers on October 5, 1980 for the appellants to show cause why the said suit should not be struck out for want of prosecution.

Mr. Lee who appeared for Messrs. Skrine & Co., solicitors for the appellants submitted to the learned judge that there were two reasons for the inaction. The first was that there had been approaches made by the respondent for settlement and the second was that the suit was linked up with Civil Suit No. 9/74 between the appellants' mother and the respondent and that the latter suit should be heard first. Counsel for the respondent denied that there had been any approach at all made by the respondent to settle the matter and refuted the contentions that this suit was linked up with Civil Suit No. 9/74. No affidavit evidence was at all filed by the appellants to answer the Registrar's Notice to show cause. Counsel for the respondent therefore asked the learned judge to strike out the suit. As Mr. Lee was appearing only on behalf of counsel for the appellants, and therefore in no position to deal with the case satisfactorily he asked for an adjournment so as to enable the solicitors of the appellants to appear and argue the case personally by themselves. The learned judge allowed the adjournment to November 1, 1980. But alas! at the resumed hearing, the appellants' solicitors did not appear. It was still Mr. Lee who appeared before the learned judge standing on behalf of the appellants' solicitors. No further argument seemed to take place on that day and in the end the learned judge made an order to strike out the suit. In his judgment he said: —

"... There is no just cause for the case to be allowed to proceed. The plaintiffs had done nothing to set the case down for trial. Even after receipt of the Notice to show cause nothing was done in this respect and even failed to contact counsel on the other side to ask for time in order to file the necessary documents."

In this appeal we are now being asked to rule that the order of the learned judge was wrong and could not stand.

Before November 12, 1976 dismissal of a plaintiff's action for want of prosecution could only be ordered by the court upon an application by the defendant to that effect. The court had then no power to pull up a slumbering plaintiff who had done nothing to bring the case to a speedy trial. Since that date, however, the Rules of the Supreme Court 1957 were amended to enable the court or the judge to issue a notice to show cause to the parties requiring the plaintiff to explain why his action should not be dismissed for want of prosecution (*Order 36 rule 11A(2) of the Supreme Court Rules 1957* and now *Order 34 rule 8(2) of the Rules of the High Court 1980*). The present position therefore is that a plaintiff's action could be dismissed for want of prosecution either on the application of the defendant or on a notice to show cause to him issued by the court, but the principle which guides the court in determining the question whether the action should be dismissed or not for want of prosecution remains the same. Surely this case reflects the dilatory nature of judicial proceedings held under procedural rules adopted in an adversary system in which the court is expected to stand aloof like the Greek God, Zeus, who sitting on the height of Mount Olympus, and only peering down from that summit upon the doings and misdoings of his subjects below will not act unless moved by them. If accumulation of cases is regarded as valid criticisms and an anathema against the administration of justice in this country, and we heard these criticism repeated time and time again not only by judges and lawyers but also by laymen such as politicians and businessmen and other concerned citizens, surely one of the key solutions to this problem is to give power to the court to intervene in appropriate cases, when situations call for intervention without having to wait to be moved by the parties. The court should be more active than it has been hitherto. Although the rules laid down elaborate time table for the parties to follow but if the plaintiff does not adhere to it and the defendant is shy or on account of respect for the plaintiff or for any other reason is reluctant to take up the step provided by the rules, the suit is simply pushed into further slumber, and perhaps into deep coma from which it could never regain consciousness and yet for statistical purposes it adds to the backlog of cases giving the court a bad name as being an indolent lot. Public interest therefore demands that the court should have the power to wake such sleeping cases and deal with them appropriately according to justice. This is the very reason why in 1976 a small departure was made in our procedural rules, from the English Supreme Court Practice whereby the High Court in this country is given power to issue notice to show cause to the plaintiff to explain why his action should not be dismissed for want of prosecution when he has taken no step to give notice of trial, notwithstanding the fact that the defendant makes no such application and in appropriate cases the court has power to dismiss the case because of the plaintiff's failure to give satisfactory response to such notice. This amendment however, does in no way affect the principle upon which the court will determine the question whether or not to dismiss the plaintiff's action for want of prosecution. Such principle, we reiterate here, remains unchanged despite the amendment to the rules.

Counsel for both sides cited to us many authorities including *Vasudevan* v. *Damodaran & Anor.*,[1] a recent decision of a different panel of this court. We accept the statement of the law stated by Abdoolcader J. who wrote the judgment of this court as being correct. We add that not unmindful of the difficulties experienced by the Court of Appeal in England in *Biss* v. *Lambeth*[2] and the Chancery Division in *Joyce* v. *Joyce*[3] in applying the House of Lord's decision in *Birkett* v. *James*,[4] we propose for the purpose of this appeal to state the principle which would guide us in deciding this appeal to be thus — that the plaintiff's action is liable to be dismissed for want of prosecution when the court is satisfied that (1) the plaintiff's default has been intentional and contumelious or (2) the plaintiff or his lawyer is guilty of such an inordinate and inexcusable delay that the defendant has been prejudiced by it. We now proceed to apply this principle to the present case under appeal.

The cause of action for which the writ was issued took place in a period between October 2, 1951 and June 6, 1972. The writ was issued on February 22, 1975 and the defence was filed on May 5, 1975. Since

then there was no action taken by the appellants to apply for summons for directions or to take any other measures to get on with the suit or otherwise to set it down for trial. Had it not been for the notice to show cause issued by the court on August 26, 1980 — after a lapse of five years and three months — this suit would still have been in deep slumber and would not have come before the court below nor before us now. In our judgment such delay coupled with complete inactivity and lack of reasonable explanation could not be otnerwise than inordinate and inexcusable. The appellants in fact made no attempts to explain the delay as there was no affidavit at all filed by any of them. Even Mr. Lee, counsel who appeared for them in the court below was merely a proxy appearing only on behalf of Messrs. Skrine & Co. solicitors for the appellants. Mr. Lee did his utmost by making statements from the bar to the effect that the delay was due to approaches made by the respondent to settle the suit and that the suit was linked up with Civil Suit No. 9/74. The statement drew a prompt denial by counsel for the respondent, and as he had no means of rebutting this denial at the request of Mr. Lee the court gave an adjournment to enable the solicitors for the appellants to appear and handle this case personally. But alas! at the resumed hearing on November 1, 1980, the appellants' solicitors continued to be absent and it was still Mr. Lee, the proxy, standing before Mohamed Zahir J. in the court below for the appellants. There being no other arguments on the notice to show cause, the learned judge had no choice but to dismiss the appellants' suit for want of prosecution by ordering it to be struck out. We found ourselves in complete agreement with the decision of the learned judge because there was indeed no explanation at all given in response to the notice either by the appellants or their lawyers. Even the adjournment granted by the learned judge did not spur the appellants and their solicitors to any action. Is this not an intentional and contumelious action disrespectful to the court? We think it is. The delay of five years and three months in our view is by no means short. It is long enough to enable a baby to grow into a big child with ability to talk intelligently and be in kindergarten preparatory to normal schooling. In our view such delay apart from being inordinate and inexcusable has also resulted in adverse effects on the respondent. The prejudice to him here is not merely confined to the possibilities of not having a fair trial or in the form of failing memory of the witnesses or lack of documents and non-availability of witnesses but also encompassing the psychological effect which the suit had on him for having it hung over his head for the last five years or so, (see *Biss* v. *Lambeth*). If we take into account the totality of the period from the commencement of the cause of action on October 2, 1951, the time span of this suit would be 28 years 10 months and 24 days. Such a lengthy period is surely too long, extending as it were more than a quarter of a century.

Counsel for the appellants submitted to us that this suit being a beneficiaries' suit for fraudulent breach of trust by a trustee there was no question of equitable doctrine of laches applicable to defeat the appellants' claim. He therefore maintained that the appellants were entitled to delay the hearing of the suit and do nothing to it for as long as they liked. We have examined the law on this equitable doctrine and for our purpose it could be briefly stated here as follows in that an action by a beneficiary against the trustee for a fraudulent breach of trust as opposed to mere breach of trust is not subject to a six year prescribed period of limitation but it could, however, be defeated by acquiescence, laches or otherwise (see section 32 of Limitation Ordinance 1953 and compare it with section 29 of U.K. Limitation Act 1939 (2 & 3 Geo. 6 c.21). However, we do not propose to deal with this subject here, despite lengthy submissions made to us by counsel on both sides because, in our view, the question of laches to defeat the appellants' claim should not be determined by us at this stage of the proceedings. This issue should be thrashed out in a trial of the appellants' suit on the merit of their claim, if such trial was to be held at all. We are here simply concerned with the procedural question whether or not the appellants' suit should be dismissed for want of prosecution. We are not here to consider and to determine whether their claim for fraudulent breach of trust against the respondent could be defeated by the equitable doctrine of laches. This question should be raised at a trial of the suit and not before us, if there was going to be a trial at all.

Now to conclude the judgment of the case under appeal, we reiterate that the appellants having kept the suit in abeyance for five years and three months during which they remained completely inactive and having given no answer nor satisfactory explanation at all as to this inactivity when called upon to do so by the court the appellants were guilty of inordinate and inexcusable delay which entitled the court to dismiss their actions for want of prosecution, if not also guilty of intentional and contumelious conduct. It will be preposterous to allow this suit to be kept alive on the basis that the appellants have right to keep the respondent waiting for so long as they like just because the substantive cause of their actions is not subject to statutory period of limitation. In our view to do so it will frustrate the amendment made to our procedural rules on November 12, 1976 which enables the court to wake up sleeping litigants.

We therefore dismiss this appeal with costs.

Appeal dismissed.

Solicitors: *Skrine & Co.; Ranjit, Thomas & Kula.*